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NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL, Petitioner,

v.

RUSSELL A. MUTH, JR., et al., Respondents.

BRIEF OF AMICI CURIAE PENNSYLVANIA PROTECTION AND ADVOCACY, INC., AND PENNSYLVANIA ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, IN OPPOSITION TO PETITION FOR CERTIORARI OF THOMAS K. GILHOOL

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] amici file this brief in opposition to the Petition for Certiorari of Thomas K. Gilhool.

Amicus curiae Pennsylvania Protection and Advocacy, Inc., is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6012, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S,C. §§10801 et seq. As such, PP&A is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

children and adults, including many handicapped children who are enrolled in special education programs.

Amicus curiae Pennsylvania Association for Children and Adults with Learning Disabilities, founded in 1967, is an organization of approximately 1300 persons, most of whom are parents of learning disabled children who receive special education services.

Amici have a substantial interest in the broad issues on which Petitioner seeks certiorari, i.e., the applicability of the Eleventh Amendment to claims under the Education of the Handicapped Act and the legal sufficiency of Pennsylvania's system for deciding administrative appeals in special education cases.

SUMMARY OF ARGUMENT

Two recent statutory amendments bear directly upon the issue of the applicability of the Eleventh Amendment to claims under the Education of the Handicapped Act. One of those amendments was considered for the first time at the appellate level by the court below; the other has not yet been considered by the appellate courts. It would be premature for this Court to grant certiorari before the impact of these enactments on the Eleventh Amendment question has been more fully examined by the lower courts.

The second issue on which Petitioner Gilhool seeks certiorari, i.e., whether he can personally decide special education cases, is not of widespread importance. Pennsylvania is one of only a very few states in which such duties are exercised by the chief state school

officer. Moreover, no substantial conflict among the courts of appeals exists on this question.

ARGUMENT

I. IN LIGHT OF RECENT AMENDMENTS TO THE EDUCATION OF THE HANDICAPPED ACT AND THE REHABILITATION ACT, IT IS PREMATURE FOR THE COURT TO ADDRESS PETITIONER'S ELEVENTH AMENDMENT QUESTION

Petitioner asserts that the holding of the lower court on the issue of the Eleventh Amendment conflicts with the decisions of other courts of appeals.2/ However, the cases cited by Petitioner were decided before the enactment of two statutory amendments that bear directly upon the Eleventh Amendment

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2/ The decision below is in accord with a decision of the First Circuit, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1790 (1986). The contrary decisions on which Petitioner relies are Gary A. v. New Trier High School District, 796 F.2d 940 (7th Cir. 1986); Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, 916 (1983) (subsequent history on other issues omitted); and Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), aff'd sub nom. Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592 (1988).

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question. Because these amendments have not yet been fully considered by the appellate courts, certiorari would be premature.

To appreciate the effect of these enactments, it is useful to review the reasoning of the lower court on the Eleventh Amendment issue. As that court recognized, Muth v. Central Bucks School District, 839 F.2d 113, 129 (3d Cir. 1988), the Education of the Handicapped Act ("the EHA" or "the Act")[3/] imposes upon States the obligation and "primary responsibility" to provide handicapped children with a free, appropriate public education. 20 U.S.C. §§1412-1414; Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176, 183 (1982). The Act also gives parents the right to an administrative hearing on "complaints with respect to any matter" involving their

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3/ 20 U.S.C. §1400 et seq.

child's education, and the right to bring a civil action in federal court to obtain review of the hearing decision. 20 U.S.C. §1415.

Because the Act's obligations are imposed in most instances upon States, "complaints" concerning the discharge of those obligations will necessarily run against States.[4/] The administrative hearings made available to parents by the Act will, therefore, frequently involve States as parties.[5/] Further, since

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4/ The EHA also imposes certain obligations on local school districts, who may therefore also be parties to certain complaints and federal-court litigation. However, the "primary" responsibility rests upon States, Rowley at 183, and the bulk of the Act imposes duties upon States only. See, e.g., 20 U.S.C. §§1412, 1413, 1414(d), 1415.

5/ This Court appears to have assumed that States can be parties to EHA litigation. See Honig v. Doe, ___ U.S. ___, ___, 108 S.Ct. 592, 607 (1988) ("Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue") (emphasis added); Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985) (Commonwealth as defendant below, respondent here).

States may be parties at the administrative level, they will also necessarily be parties to federal-court reviews of administrative decisions. Thus, Congress has in the text of the Act "express[ed] . . . in unmistakable language" its intention that States may be sued in the federal courts. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). The Act is in this sense very different from statutes which do not have as their central thrust the imposition of obligations upon States; in such instances, it is often less clear that Congress, merely by enacting a "general authorization for suit," Atascadero at 246, intended to abrogate Eleventh Amendment immunity.6/

6/ For example, the statute considered in Atascadero imposed duties generally upon "recipients" of federal funds but did not mention States. Similarly, in Welch v. State Department of Highways and Public Transportation, ___ U.S. ___, 107 S.Ct. 2941 (1987), the Jones Act generally authorized "[a]ny seaman" to sue his employer in federal court but made no reference to States. In
(footnote continued)

Adopting this analysis, the lower court held that "[t]he text of EHA and its legislative history leave no doubt that Congress intended to abrogate the 11th Amendment immunity of the states." Muth v. Central Bucks School District, 839 F.2d 113, 128 (1988). In reaching this conclusion, moreover, the court examined not only the original text of the Act but also the 1986 amendment, Pub. L. 99-372, 100 Stat. 796 (1986) (the Handicapped Children's Protection Act). The

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(footnote continued from previous page)
such instances, the question can fairly be raised whether, in enacting a general authorization for suit in federal court, Congress also meant to take the significant step of abrogating the Eleventh Amendment. No such question exists where, as in the EHA, virtually the entire text of the Act concerns the duties of States.

As to Petitioner's assertion that the EHA does not literally mention the Eleventh Amendment, or "state[] that Congress focussed precisely on state liability to private parties," neither Atascadero nor any other decision of this Court requires that the Eleventh Amendment be cited by name or that Congress use any particular form of words. What is required is clarity of Congressional purpose, which is amply present here.

court is the first, and to date the only, appellate court to consider the significance of that amendment.

Section 2 of the amendment, which concerns the award of attorney's fees to prevailing parents in EHA proceedings, states that certain rules relative to the reduction of attorney's fee awards "shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding . . ." Pub. L. 99-372, §2, 100 Stat. 796 (1986), codified at 20 U.S.C. §1415(e)(4)(G) (emphasis added). This language appears to be susceptible of no interpretation other than that States were expected to be parties to the "action[s] or proceeding[s]" brought under the Act.

Petitioner dismisses this point on the ground that it relates to attorney's fees, and that courts had held even before 1986 that

attorney's fees could be awarded under 42 U.S.C. §1988 notwithstanding the Eleventh Amendment. This misses the point. The language of the amendment is cited not for what it says about attorney's fees, but for what it says about Congress' understanding concerning who the parties to the underlying action would be. In our view, and in that of the Third Circuit, Congress believed that States would be parties, because it used the term "State." At the very least, this Court should allow for further consideration by the lower courts of this new language before accepting the matter for review.

Also relevant to the Eleventh Amendment issue is Section 1003(a)(1) of the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, §1003(a)(1), 100 Stat. 1845 (1986), codified at 42 U.S.C. 2000d-7(a)(1). That amendment provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States

> from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance [emphasis added].

The lower courts have not yet considered whether, for purposes of this provision, the EHA is a "statute prohibiting discrimination by recipients of Federal financial assistance." However, an affirmative answer is strongly suggested by the language of the EHA itself, 20 U.S.C. §1400(b)(9),[7] and by the holding of this Court and of several courts of appeals that the Act codifies the Constitutional right of handicapped children to Equal Protection of the laws. Smith v. Robinson,

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6/ That section provides: "The Congress finds that . . . it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law" (emphasis added).

468 U.S. 992, 1009-13 (1984); David D. v. Dartmouth School Committee, 775 F.2d 411, 421-22 (1st Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1790 (1986); Gary A. v. New Trier High School District No. 203, 796 F.2d 940, 944 n. 5 (7th Cir. 1986). If the EHA is found to be an anti-discrimination statute for purposes of the Rehabilitation Act amendment, the possibility of Eleventh Amendment immunity in EHA cases is entirely eliminated. This question, like that of the significance of the 1986 amendments to the EHA, should initially be addressed by the lower courts.

Finally, the Rehabilitation Act amendment is significant for another, entirely distinct reason. The amendment expressly abrogates immunity with respect to claims under §504 of the Rehabilitation Act, 29 U.S.C. §794 ("§504"). Regulations under §504 provide, in language virtually identical to that of the EHA, that States must provide handicapped

children with a free, appropriate public education. 34 C.F.R. §§104.33, 104.3(f); and see Pub. L. 100-259, §4(b)(1), 102 Stat. 29 (1987) (applying obligations to States). For this reason, most if not all cases involving the provision of an appropriate education under the Education of the Handicapped Act can equally well be brought -- now without Eleventh Amendment difficulty -- under §504. A holding that EHA claims are barred by the Eleventh Amendment would thus have little if any practical consequence, since parents seeking relief against States in special education matters could obtain identical relief by an alternate route.[8/]

Accordingly, the Court should deny certiorari on Petitioner's Eleventh Amendment question.

8/ 20 U.S.C. §1415(f) authorizes the filing of parallel claims under the EHA and §504.

II. THE ISSUE OF THE IMPARTIALITY OF A CHIEF STATE SCHOOL OFFICER UNDER THE EDUCATION OF THE HANDICAPPED ACT IS NOT OF WIDESPREAD IMPORTANCE AND DOES NOT WARRANT REVIEW FOR ANY OTHER REASON

Petitioner believes that he has the right, under the EHA, personally to decide appeals from administrative hearing decisions. The lower court disagreed, holding that Petitioner must instead appoint hearing officers, not employed by his agency, to perform the review function.

Initially, we note that this is hardly an issue of widespread importance. The United States Department of Education, which oversees the States' implementation of the Act, has responded as follows to our inquiry concerning the number of states in which the chief state school officer serves as reviewing official:9/

> The one other example [in addition to Pennsylvania] that we are aware of is New York, where the Commissioner functions as the due process review officer for EHA-B purposes.

9/ A copy of the response of the Department of Education is attached as Appendix A.

Thus, the situation challenged here evidently exists in only a few states. Moreover, the asserted conflict among the Circuit Courts is of limited significance. The First, Third, Fifth and Eighth Circuits,10/ which have considered the matter in some detail, are in agreement. The conflict results from a decision of the Eleventh Circuit, which in a single paragraph dismissed the issue as "frivolous."11/ This "conflict" is not so substantial or important as to merit this Court's review -- especially since, notwithstanding the Eleventh Circuit's decision, the state at issue in that case has ceased using its Commissioner as reviewer.

10/ Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980).

11/ Victoria L. v. District School Board of Lee County, 741 F.2d 369, 373-74 (11th Cir. 1984).

On the merits, moreover, the issue appears clear. Petitioner administers the department to which the EHA has assigned "primary responsibility" for the education of handicapped children. Board of Education of the Hendrick Hudson School District v. Rowley, supra, 458 U.S. at 183. Parental complaints, therefore, will inevitably be directed against him and his department. It seems obvious that he cannot be an "impartial" decision-maker in such disputes -- just as a judge cannot impartially decide a case to which he or she is a party. In the legislative history of the Act, Congress made precisely this point:

> The hearing will be conducted by an impartial officer since the State or local agency or intermediate unit will be a party to any complaint presented. . . .

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1502; see also 20 U.S.C. §1415(b)(2) (prohibiting "employee of such

agency or unit involved in the education or care of the child" from serving as impartial hearing officer).

Further, Petitioner exercises pervasive control over local school districts. See, e.g., 71 P.S. §352 (general oversight duties); 24 P.S. §§13-1372(3), 1373 (duty to oversee and approve special classes for handicapped children). He is thus involved in the process of adopting educational priorities; allocating limited financial resources; and generally attempting to ensure the accomplishment of broad statewide objectives. These executive and quasi-legislative roles, while legitimate and essential, are inconsistent with the absolute neutrality required of an impartial decision-maker in individual cases.

The harmful consequences that Petitioner expects to follow from the holding of the lower court are entirely unlikely. In particular, Petitioner will no more be

prevented from "develop[ing] a coherent special education policy" (Petition at 47) than the Secretary of Health and Human Services is prevented, by the existence of administrative law judges who decide individual cases, from making national policy under the Social Security Act.12/

Accordingly, certiorari on the issue of Petitioner's impartiality should be denied.

12/ Petitioner's argument (Petition at 42-43) that Pennsylvania's system results from a consent decree entered in PARC v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972), and that Congress was generally guided by PARC in drafting the EHA, is unavailing. As this Court has noted, Congress adopted certain provisions of PARC while rejecting others. Honig v. Doe, supra, ___ U.S. at ___, 108 S.Ct. at 605. Obviously, PARC's provision for review by the chief state school officer was not among those that Congress included in the Act.

CONCLUSION

For these reasons, amici curiae Pennsylvania Protection and Advocacy, Inc., and the Pennsylvania Association for Children and Adults with Learning Disabilities urge that the Petition for Certiorari of Thomas K. Gilhool be denied.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR -8 1988

Mr. Leonard Rieser
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Dear Mr. Rieser:

Thank you for your letter to Jeff Champagne dated March 29, 198 concerning State level review officers under Part B of the Education Handicapped Act (EHA-B).

Your letter asked if we were aware of other States with review officer procedures similar to those in Pennsylvania. The one other example we are aware of is New York, where the Commissione functions as the due process review officer for EHA-B purposes.

I note also that the Third Circuit has ruled in the case of Muth v. Smith and that you participated as counsel for the Pennsylvania Association for Children and Adults with Learning Disabilities. Congratulations on your successful work on the case.

Sincerely,

G. Thomas Bellamy, Ph.D.
Director
Office of Special Education
Programs

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APPENDIX A